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August 13, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: MM Docket No. 00-245
Alberta and Dinwiddie, Virginia, and
Whitakers and Garysburg, North Carolina

Dear Ms. Dortch:

Transmitted herewith, on behalf of Garysburg Radio, are an original and four copies of its
"Consolidated Opposition to Petitions for Reconsideration" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,


Anne Goodwin Crump
Counsel for Garysburg Radio

Enclosures

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BEFORE THE

Federal Communications Commission

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WASHINGTON, D.C. 20554

AUG 13 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM DOCKET NO. 00-245
Table of Allotments, FM Broadcast Stations.)	RM-9971
(Alberta and Dinwiddie, Virginia, and)	
Whitakers and Garysburg, North Carolina)	

Directed to: Chief, Allocations Branch

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

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August 13, 2002

TABLE OF CONTENTS

Summary	i
I. Background	1
II. MainQuad Petition for Reconsideration	2
A. Community Population Differences Determinative	2
B. Additional, Separate Reallotment Proceeding Irrelevant	8
C. Community of Alberta Served by Modification of WSMY-FM License to Channel 299A	9
III. Dinwiddie Radio Petition for Reconsideration	11

SUMMARY

Garysburg Radio, by its attorneys, herein respectfully submits its Consolidated Opposition to the "Petition for Reconsideration" filed by Dinwiddie Radio Company ("Dinwiddie Radio") on June 7, 2002, and the "Petition for Reconsideration and Clarification" filed by MainQuad Broadcasting, Inc. ("MainQuad") on July 11, 2002.

This proceeding began with the filing of a petition for rule making by MainQuad's predecessor-in-interest, in which it was proposed that Channel 276C3 be substituted for Channel 276A at Alberta, Virginia, that the channel be reallocated to Whitakers, North Carolina, that the authorization for WSMY-FM be modified accordingly, and that Channel 299A be added at Alberta as a replacement for that community's sole local radio transmission service. Thereafter, Garysburg Radio filed a counterproposal, in which it proposed the substitution of Channel 299A for Channel 276A at Alberta and the allotment of Channel 276A to Garysburg, North Carolina. Dinwiddie Radio also filed a counterproposal, in which it suggested the retention of Channel 276A at Alberta and the allotment of Channel 299A at Dinwiddie, Virginia.

In the *Report and Order* in this proceeding, DA 02-1153, released May 17, 2002 ("*R&O*"), the Commission's staff correctly determined that the public interest would best be served by the modification of the WSMY-FM license to specify operation on Channel 299A and the reallocation of Channel 276A to Garysburg. The Commission noted that any of the three proposals would provide first local service. Since Garysburg is the largest of the three communities, the *R&O* allotted the channel to Garysburg, citing *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828, 9829 (1995) ("*Blanchard*") and *Rose Hill, et al., North Carolina*, 11 FCC Rcd 21223, 21231 (Allocations Br. 1996), *aff'd* 15 FCC Rcd 10739 (2000),

rev. denied, 16 FCC Rcd 15610 (2001) (“*Rose Hill*”). MainQuad and Dinwiddie Radio have each sought reconsideration of the *R&O* on different grounds.

MainQuad argues that the Commission erred in relying on *Blanchard* and *Rose Hill* in making the decision in this proceeding and points to another Commission case decided on the same day as *Blanchard*. As set forth herein, MainQuad’s reasoning in this regard is erroneous and flies in the face of consistent Commission precedent. Further, MainQuad argues that the Commission should take into account the actions of an affiliate in a separate rule making proceeding, but the *R&O* correctly determined that such considerations are too speculative to be of decisional significance. In addition, the community of Alberta would best be served by modification of WSMY-FM’s license to specify Channel 299A as that action would allow a local station to resume service to Alberta in the most expeditious manner.

Dinwiddie Radio argues that the Commission’s staff erred in that it underestimated the population of Dinwiddie. In this regard, it is significant to note that the 2000 U.S. Census did not provide any population figures for Dinwiddie, although it did list the populations of other unincorporated towns and Census Designated Places in Virginia. Even if Dinwiddie Radio’s claims about the population of Dinwiddie were fully credited, however, the result would not change, as the community of Dinwiddie still would be smaller than Garysburg.

Accordingly, the petitions for reconsideration filed by MainQuad and Dinwiddie Radio should be denied, and the *R&O* in this proceeding should be affirmed.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

Garysburg Radio, by its attorneys, hereby respectfully submits its Consolidated Opposition to the "Petition for Reconsideration" filed by Dinwiddie Radio Company ("Dinwiddie Radio") on June 7, 2002, and the "Petition for Reconsideration and Clarification" filed by MainQuad Broadcasting, Inc. ("MainQuad") on July 11, 2002.¹ With respect thereto, the following is stated:

I. Background

1. The instant proceeding began with the filing of a petition for rule making by MainQuad's predecessor-in-interest, in which it was proposed that Channel 276C3 be substituted for Channel 276A at Alberta, Virginia, that the channel be reallocated to Whitakers, North Carolina, that the authorization for WSMY-FM be modified to reflect the new channel and community, and that Channel 299A be added at Alberta as a replacement for that community's

¹ Public notice of the petitions for reconsideration was published in the *Federal Register*, Vol. 67, No. 145, on Monday, July 29, 2002. Therefore, pursuant to Sections 1.429(f) and 1.4(b)(1) of the Commission's Rules, this Consolidated Opposition is timely filed.

sole local radio transmission service. Thereafter, Garysburg Radio filed its “Comments and Counterproposal,” in which it proposed the substitution of Channel 299A for Channel 276A at Alberta and the allotment of Channel 276A to Garysburg, North Carolina. Dinwiddie Radio also filed “Comments and Counterproposal,” in which it suggested the retention of Channel 276A at Alberta and the allotment of Channel 299A at Dinwiddie, Virginia.

2. In the *Report and Order* in this proceeding, DA 02-1153, released May 17, 2002 (“*R&O*”), the Commission’s staff correctly determined that the public interest would best be served by the modification of the WSMY-FM license to specify operation on Channel 299A and the reallocation of Channel 276A to Garysburg. The Commission noted that any of the three proposals would provide first local service. Since Garysburg is the largest of the three communities, the *R&O* allotted the channel to Garysburg, citing *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828, 9829 (1995) (“*Blanchard*”) and *Rose Hill, et al., North Carolina*, 11 FCC Rcd 21223, 21231 (Allocations Br. 1996), *aff’d* 15 FCC Rcd 10739 (2000), *rev. denied*, 16 FCC Rcd 15610 (2001) (“*Rose Hill*”). MainQuad and Dinwiddie Radio have each sought reconsideration of the *R&O* on different grounds. As set forth below, however, the petitions for reconsideration are without merit and should be denied.

II. MainQuad Petition for Reconsideration

A. Community Population Differences Determinative

3. MainQuad’s primary focus in its petition is its claim that the Commission’s staff somehow erred in relying upon *Blanchard* and *Rose Hill*, and the long line of cases cited therein, which stand for the proposition that, when competing proposals for first local service are considered, the community with the largest population prevails. MainQuad acknowledges that

the population of Garysburg is larger than that of Whitakers, but it argues that the Commission should consider and weigh in its favor the larger number of persons who, although already in a well-served area, would receive an additional reception service if its proposal were adopted. According to MainQuad, the population difference between Garysburg and Whitakers of 455 persons is too small to be considered in light of the additional secondary service which its proposal might provide. In essence, with this argument, MainQuad is suggesting a substantial change in long-standing Commission policy. Under MainQuad's theory, a proposal that a greater number of persons in a well-served area would receive yet another service could outweigh a proposal which would allow greater number of persons to enjoy first local transmission service. This theory flies squarely in the face of numerous case precedents, however.

4. In addition to *Blanchard* and *Rose Hill*, in cases in which two well-served communities were competing for a first local service, the Commission has repeatedly based its decision on the relative populations of the two communities, without any discussion or consideration of the relative populations within the proposed service areas. See, e.g., *Athens and Atlanta, Illinois*, 11 FCC Rcd 3445 (1996); *Berlin, De Forest, Markesan, and Wautoma, Wisconsin*, 10 FCC Rcd 7733 (Alloc. Branch 1995); *Bostwick and Good Hope, Georgia*, 6 FCC Rcd 5796 (Alloc. Branch 1991); *Seymour and Pigeon Forge, Tennessee*, 2 FCC Rcd 2016 (Policy & Rules Div. 1987). Moreover, the Commission's staff previously has squarely rejected the very proposition advanced by MainQuad.

5. Specifically, in *Cumberland, Kentucky* and *Weber City, Virginia*; *Glade Spring, Marion, Richlands and Grundy, Virginia*, DA 02-620, released March 19, 2002, the Commission addressed a situation remarkably similar to that of the instant case. There, the licensee of an

existing station had proposed the upgrade to Class C3 and reallocation of its channel to Weber City as a first local transmission service. Another party then submitted a counterproposal, suggesting the allocation of the channel as a Class A station to Glade Spring as a first local transmission service. There, the Commission specifically recognized that the proposed reallocation to Weber City would result in a net gain of service to 265,263 persons. In contrast, a review of a copy of the Counterproposal in that proceeding as included in the Commission's Electronic Comment Filing System ("ECFS") records for MM Docket No. 99-244 shows that the Glade Spring proposal would serve a total of only 56,718 persons. Thus, the difference in the net number of persons who would gain secondary service was 208,718, almost double that argued by MainQuad in the instant proceeding.

6. Nevertheless, the Glade Spring proposal was preferred over the Weber City proposal based upon the difference in population between the two communities. There that difference was only 41 persons, less than one-tenth the size of the population difference in the instant case. The Commission's staff explained its decision by stating that "[s]ince we are ultimately deciding this case upon first local transmission service principles, we must be governed by the populations that would receive first local transmission service as opposed to enhanced secondary service." *Id.* at ¶10. The decision further noted that the Commission's view was "further buttressed by the fact that the gain and loss areas are otherwise well-served with five or more full-time reception services." *Id.* The same circumstances obtain in this proceeding.

7. Likewise, in *Rose Hill*, the upgrade and reallocation petitioner argued that its proposal would be a better and more efficient use of the spectrum because the proposed facility would provide service to a substantially greater number of people. 11 FCC Rcd at 21228. There, the

comparison was between a service area which would encompass a population of 336,401 and a service area with a population of 31,096, a difference of 305,305 persons. Further, the reallocation petitioner also argued that the difference in population between the two proposed communities, which amounted to 370 persons, was too small to be meaningful. The Commission's staff rejected both arguments and found that, "in conformance with Commission precedent," it would allot the channel to the larger of the two communities. *Id.* at 21231.

Further, on reconsideration, the Commission's staff noted that "[i]t is well established that when comparing two competing counterproposals that would provide a first local service and finding neither community distinguishable based on reception services, the decisional factor is the population difference." *Rose Hill*, 15 FCC Rcd at 10744 (footnote omitted). This decision was affirmed by the full Commission. 16 FCC Rcd 15610. At that time, the Commission stated that it had "thoroughly reviewed the staff decision and find that there are no errors of law...." *Id.*

8. Clearly, the same reasoning is applicable in the instant proceeding. Here, as in *Rose Hill*, one party has proposed the reallocation of a channel to a new community as its first local service, while another party has counterproposed the mutually exclusive allotment of the channel to a larger community as a first local service. Just as in *Rose Hill*, the initial petitioner has argued that, despite the difference in community sizes, its proposal should be preferred because it would provide overall secondary service to a greater number of people. Furthermore, in *Rose Hill*, the distinction between the two communities' populations was smaller (370 as opposed to 455) and, contrary to MainQuad's assertion, the difference in total population to be served was much larger (305,305 as opposed to 127,000). Thus, it is clear that the reasoning of *Rose Hill*, as affirmed by the Commission, is directly applicable to the case at hand.

9. Nonetheless, MainQuad argues that the Commission should look not to *Blanchard* and *Rose Hill*, but to an unrelated case adopted the same day as *Blanchard*, namely *Seabrook, Huntsville, Bryan, Victoria, Kennedy, and George West, Texas*, 10 FCC Rcd 9360 (1995) (“*Seabrook*”). MainQuad urges that, since *Seabrook* and *Blanchard* were adopted by the Commission on the same day, the two decision must be read in such a way as to conform with each other. This argument, however, amounts to nothing more than the proverbial attempt to compare apples and oranges.

10. *Seabrook* involved no proposed reallocations but rather two stations which wished to upgrade their respective facilities at their existing communities. Since the two proposals were mutually exclusive, a comparison between the two was necessary. It was found that one of the proposals would provide a second aural service to 455 persons, while the other proposal would provide additional service to 144,000 more persons than the first proposal. There, the Commission found that the proposed service to a gray area encompassing only 455 persons was *de minimis*, and that the proposal that would provide service to a significantly larger population should prevail.

11. MainQuad argues here that the finding of the *de minimis* import of provision of a second service to 455 people should apply in the context of first local service as well. While this argument might appear to have some initial, facial appeal, a closer look shows that the circumstances and applicable reasoning are entirely different. In the case of *Seabrook*, there was no issue of first local service, and in the instant case, there is no question of any underserved area. Furthermore, in *Seabrook*, the determination made about how to consider the competing proposals was fundamentally different from the type of determination to be made in this

proceeding.

12. In *Seabrook*, the threshold question was whether one proposal should be found to serve FM allotment priority two, while the other one served only priority four. There was no comparison between two proposals which both provided a second service, only to differing numbers of people. In that way, the analysis is quite different from that in this proceeding, where all of the parties propose to advance the same FM allotment priority, namely priority three, but to differing degrees. In *Seabrook*, however, the question was whether the limited second service to be provided even qualified the proposal to be considered under priority two. In that way, the *Seabrook* case is much more analogous to those cases in which the Commission has determined whether a particular small community is entitled to a preference for first local service under the “quiet village” doctrine than it is to the instant case. See, e.g., *Debra D. Carrigan*, 58 R.R.2d 96, 104 (1985); *Santee Cooper Broadcasting Co.*, 57 R.R.2d 662 (Rev. Bd. 1984); *Ruarch Associates*, 57 R.R.2d 1593 (Rev. Bd. 1984).

13. Here, the comparison to be made is among proposals, all of which will provide a first local transmission service, although the numbers to receive this benefit differ among the proposals. When all proponents would provide the same benefit, the question to be examined is the degree to which that benefit will be provided. The Garysburg Radio proposal would provide a first local service to 455 more people than would the MainQuad proposal. While MainQuad may argue that this number is relatively small, it represents a 57 percent increase over the number of persons who would receive a first local service under its proposal. The Commission has made it clear in *Rose Hill* that the relevant factor to be examined in such circumstances is the relative populations of the communities involved, and it has found differences of far smaller magnitude

than that in the instant case to be significant. Furthermore, in *Rose Hill*, a case which was decided after *Seabrook*, the full Commission specifically indicated that it had carefully examined the staff's decision below, and it affirmed the finding that, when two communities are both well-served, the community with the larger population should receive the first local service. Thus, the Commission's staff correctly found that Garysburg was the more deserving community in this instance.

B. Additional, Separate Reallotment Proceeding Irrelevant

14. MainQuad also argues that the Commission's staff should have taken into account a proposal made by one of its affiliates, the licensee of WPTM(FM) to change that station's community of license to Garysburg. The Commission's staff was entirely correct in its refusal to consider that proposal, however. While the MainQuad affiliate has submitted a Petition for Rule Making seeking the reallotment, the proposal is not before the Commission in this proceeding. Moreover, the proposed change cannot be considered in this proceeding because it was first submitted after the counterproposal deadline in this proceeding. Further, the Commission has not yet even released a Notice of Proposed Rule Making to seek comment on the proposed reallotment. Given that fact, the Commission can have no firm assurance that the MainQuad affiliate would ever move forward to implement the change in community of license. Given that the proposal is moving forward in a separate proceeding, after the decision in the instant proceeding became final, it would be possible for the MainQuad affiliate to withdraw the reallotment proposal or simply fail to comment in favor of it once a Notice of Proposed Rule Making is released. Alternatively, in the time that the proceeding is pending, the MainQuad affiliate might sell the station, and the new licensee might wish to retain Roanoke Rapids as the

community of license and therefore withdraw the petition. While Garysburg Radio does not mean to suggest that MainQuad would act in bad faith, there are many possibilities for intervening events to prevent the proposed Roanoke Rapids to Garysburg reallocation from ever becoming a reality. Thus, the *R&O* was entirely correct in concluding that reliance on that proposal would be speculative.

15. Furthermore, even if the reallocation were made, there would be no meaningful change in the existing services at Garysburg. WPTM(FM) already provides city-grade service to the community of Garysburg, and its licensee has indicated no plans for making any technical changes. It therefore is likely that the only perceptible difference would be the addition of the community of Garysburg to the hour station identifications. It is clear that the proposed WPTM(FM) reallocation is nothing more than a convenient ploy in MainQuad's attempt to move WSMY-FM from Alberta to the Rocky Mount, North Carolina, suburb of Whitakers. Accordingly, the *R&O* correctly rejected consideration of that matter in this proceeding.

C. Community of Alberta Served by Modification of WSMY-FM License to Channel 299A

16. In addition, while MainQuad points to the necessary procedural delays in commencement of service if a new channel is allotted to Garysburg, it ignores the ill effects which those self-same procedural delays would have on the community of Alberta. It must be remembered that MainQuad has proposed the removal of the sole local radio transmission service from the community of Alberta. MainQuad also has proposed the allotment of Channel 299A at Alberta as a replacement channel of sorts, and it has indicated that it would wait to begin service at Whitakers until the new station at Alberta began service. In order for these events to take place, however, after the allotment is made, the Commission must first open a filing

window. The Commission must then conduct an auction, address any questions raised concerning the prevailing bidder, process a long-form application, and award a construction permit. The ultimate permittee then will have a period of three years in which to build the station. In the meantime, it is unclear what, if any, service the community of Alberta will receive from WSMY-FM.

17. MainQuad has previously indicated in this proceeding that it had difficulties in operating on Channel 276A because of interference caused to local residents' reception of WWBT(TV), Channel 12, Richmond. While it has never adequately explained what efforts it has made to mitigate these alleged interference problems, it has asserted that they were sufficient to cause MainQuad to take WSMY-FM silent, and the station remains silent. If WSMY-FM is to remain on Channel 276A pending commencement of operations by a new Alberta station on Channel 299A, it is unclear how the community of Alberta will receive more than on-again/off-again service only sufficient to keep the WSMY-FM license from automatically expiring. Although MainQuad indicated in its "Response to Order to Show Cause," filed February 11, 2002, that it believed that it had found a new transmitter site which would alleviate the interference difficulties, and that it anticipated filing a modification application shortly, the Commission's Consolidated Data Base System ("CDBS") indicates that, over six months later, no such application has been filed. Moreover, it seems highly unlikely that a licensee would dismantle facilities which it constructed less than two years ago to move to a new site and construct additional, new facilities, all with the expectation that it would then construct yet a third set of new facilities for the same station within a few years. Thus, it seems clear that the community of Alberta would receive at best limited service if WSMY-FM remains on Channel

276.

18. In contrast, the channel change for WSMY-FM adopted in the *R&O* will allow the community of Alberta to retain its local service and will remedy the interference problems which WSMY-FM has previously experienced. Further, no change in transmitter site is required for WSMY-FM to begin operations on Channel 299A, and there is no need to await further action by the Commission before implementing the change. The modification of WSMY-FM's license to specify operation on Channel 299A therefore would represent the most expeditious means of resuming meaningful service to Alberta. Thus, it is clear that the public interest, and in particular the interests of the community of Alberta, are best served by the channel allotments adopted in the *R&O*. Accordingly, MainQuad's petition for reconsideration must be denied.

III. Dinwiddie Radio Petition for Reconsideration

19. Dinwiddie Radio also seeks reconsideration of the decision to substitute Channel 299A for Channel 276A at Alberta and to allot Channel 276A at Garysville. Dinwiddie Radio instead seeks the allotment of Channel 299A at Dinwiddie. Even if all of Dinwiddie Radio's arguments are accepted in their entirety, however, Dinwiddie Radio has not demonstrated that the *R&O* contained any error of decisional significance. Accordingly, its Petition for Reconsideration must be rejected.

20. Dinwiddie first argues that the Commission's staff may have underestimated the population of the community of Dinwiddie. Dinwiddie Radio acknowledges that, since the community is unincorporated and has no defined boundaries, it is difficult to ascertain the population of Dinwiddie. The community of Dinwiddie is not listed in the 2000 U.S. Census. Instead of admitting that this fact militates against the finding of community status for Dinwiddie,

Dinwiddie Radio claims that this omission is because the U.S. Census does not separately report population figures for unincorporated communities. This assertion is incorrect, however. A look at the 2000 U.S. Census listings for Places in Virginia shows not only incorporated cities but also unincorporated towns and Census Designated Places.² See, <http://factfinder.census.gov>. For example, just in the Northern Virginia area, the Census Designated Places of Dunn Loring, Fort Hunt, Franconia, Huntington, Hybla Valley, Merrifield, and Mount Vernon, among others, are each listed separately. *Id.* Furthermore, the small size of a community, standing alone, does not preclude its inclusion in the list of Places in Virginia. For example, Hallwood town, population 290; Madison town, population 210; New Castle town, population 179; St. Charles town, population 159; Short Pump CDP, population 182; and Scottsburg town, population 145, also are all listed separately in the 2000 U.S. Census. *Id.* Taking these listings into consideration, the fact that Dinwiddie was not separately listed in the U.S. Census indicates that the Census Bureau did not find an identifiable community to which it could assign a population. Clearly, therefore, the rather amorphous and sparsely populated Dinwiddie should not be preferred over the community of Garysburg for a first local radio transmission service.

21. Even if all of Dinwiddie Radio's arguments about the population of Dinwiddie were credited, however, the result would not change. The most that Dinwiddie Radio can claim is

² It should be noted that, in the Commonwealth of Virginia, city status is not dependent on size but on rather on its status as an incorporated entity separate and independent from the county in which it is located. Thus, for example, the community of Norton, population 3,904 is listed as a city. Towns, on the other hand, do not have the same incorporated status and are dependent upon the surrounding county for many services, such as police and fire protection and schools. It should be noted, that despite Dinwiddie Radio's claims, many towns in Virginia are listed in the U.S. Census. <http://factfinder.census.gov>.

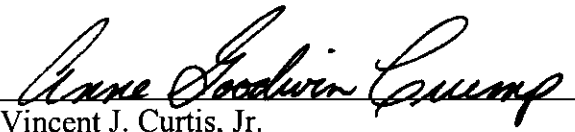
that, at the time of the 1990 Census, 751 persons lived within depicted boundaries, and that the population must have grown since that time. Assuming that these claims are accurate, and further assuming that Dinwiddie has grown at the same rate as Dinwiddie County overall, then between 1990 and 2000, Dinwiddie would have grown at the rate of 10.1 percent. *See*, <http://quickfacts.census.gov>. If so, then it could be calculated that the population of 751 would have grown to be approximately 827 persons. Even if that is the case, the population of Dinwiddie is some 427 persons less than the Garysburg population of 1,254. Therefore, as set forth above, since both communities are well-served in terms of reception services, the community of Garysburg must be preferred because of its larger population. Thus, even if the Commission's staff erred in determining the population of Dinwiddie, that error would have no decisional significance.

22. Dinwiddie Radio also argues that the Commission's staff incorrectly failed to accord its proposal greater weight because it would provide the first local radio transmission service to Dinwiddie County. In this regard, it should be noted that, according to the 2000 U.S. Census, the entire population of Dinwiddie County is only 24,533. Moreover, it is well-settled that channel allotments are made to communities rather than counties. Accordingly, Dinwiddie Radio's argument is without merit.

WHEREFORE, the premises considered, Garysburg Radio respectfully requests that the petitions for reconsideration submitted by MainQuad and Dinwiddie Radio be denied, and that the *R&O* in the instant proceeding be affirmed.

Respectfully submitted,

GARYSBURG RADIO

By: 
Vincent J. Curtis, Jr.
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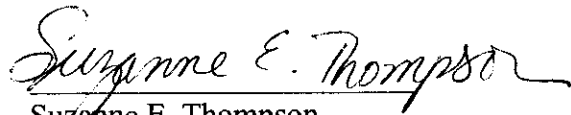
CERTIFICATE OF SERVICE

I, Suzanne E. Thompson, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C. do hereby certify that true copies of the foregoing "Consolidated Opposition to Petitions for Reconsideration" were sent this 13th day of August, 2002, by United States mail, postage prepaid, to the following:

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